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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 242

MORRIS W. MAMLIN AND RALPH E. WELKER,
PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 10) is reported at 77 F. Supp. 930.

JURISDICTION

The judgment of the Court of Claims was entered on June 1, 1948 (R. 14). The petition for a writ of certiorari was filed on August 23, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Petitioners invented a face protector alleged to be particularly adapted to protect fire fighters at fires involving aircraft. The patent for this invention, however, makes no claim for peculiar suitability to aircraft fires and, in fact, makes no reference whatsoever to aircraft or aircraft fires. The question presented is whether this device is a design "relating to aircraft or any components thereof" within the meaning of Section 10 (i) of the Air Corps Act of July 2, 1926, c. 721, 44 Stat. 780 (10 U. S. C. 291, *et seq.*), which authorizes suit against the United States in the event of use or manufacture of such designs by or for any department of the Government.

STATUTE INVOLVED

The statutory provision involved is Section 10 (i) of the Air Corps Act of July 2, 1926, *supra* (10 U. S. C. 310 (i)), which provides as follows:

> (i) Any person, firm, or corporation that shall complain that his, their, or its designs hereafter developed relating to aircraft or any components thereof are used or manufactured by or for any department of the Government without just compensation from either the Government or any other source, may within four years from the date of such use file suit in the Court of Claims for the recovery of his reason-

able and entire compensation for such use and manufacture after the date of this Act.

STATEMENT

Petitioners brought suit in the Court of Claims on November 3, 1947, for compensation for the alleged use or manufacture by the United States of a shield and attachments designed by petitioners to protect the faces of fire fighters. The demurrer of the United States was sustained and the petition dismissed (R. 1, 10, 14).

The petition alleged the unauthorized use and manufacture by the United States of petitioners' design of a safety appliance originated and developed by them for fighting fires on aircraft or at aircraft crashes at air bases (R. 1). Petitioners' claim, so far as relevant here (Pet. p. 4), is based upon Section 10 (i) of the Air Corps Act of July 2, 1926 (10 U. S. C. 310 (i)), which authorizes suit against the United States for its uncompensated use of designs "relating to aircraft or any components thereof" (R. 3–4). No claim based upon a patent is made in the petition (R. 1–4, 14), although it appears that a patent for the device in question was applied for on December 9, 1944, and was granted on June 3, 1947, a copy of which was attached to the petition in the court below (R. 8). The patent is for a face protector for fire fighters, but contains no mention at all of any special use or adaptability

in connection with aircraft fires (R. 8–9). No reference is made in the patent to aircraft, aircraft crashes, aircraft fires, air bases, or to anything having a peculiar relation to aircraft (R. 8–9).

Relying upon a comparison of the provision in question with other statutory provisions and upon the statutory background, the Court of Claims sustained the Government's demurrer on the ground that Section 10 (i) granted the right to sue only for the use of designs "relating to aircraft or any components thereof" and not "designs relating to aeronautical accessories" (R. 13). In view of this conclusion, the court found it unnecessary to decide the further questions whether petitioners' patented face protector, which claimed no peculiar functional relationship to aircraft, was a "design" as that term is used in Section 10 (i) or an "aeronautical accessory" at all (R. 13).

ARGUMENT

The question in issue is whether Section 10 (i) of the Air Corps Act, which creates a right to sue the United States for the use of designs "relating to aircraft or any components thereof" irrespective of whether the designs are patented or patentable, extends to a patent for which no statement or claim of use in connection with aircraft was made in the patent application. The decision of the court below turned on its determination

that the face protector for fire fighters was at most an aircraft accessory and that the provision enabling suit was limited to designs relating to aircraft and their components and was not intended to apply to designs relating to aircraft accessories. We believe the court was correct in this interpretation of the statutory provision. It would seem, however, even if aircraft accessories are considered within the scope of Section 10 (i), that no right to sue exists in the instant case because the device in question cannot properly be considered an aircraft accessory since it appears to have been invented for general use and was not peculiarly designed for or adapted to aviation purposes.[1]

It is inconceivable that Congress would extend the right to sue the United States without a patent to the broad and general area in which petitioner's device falls without making its intention to do so unmistakably clear. The statutory provision, however, falls far short of establishing a

[1] The allegations of the petition filed in the court below, that petitioners' invention "was designed by them for fighting fires on aircraft * * *" and "is particularly adapted to protect fire fighters at fires involving aircraft" (R. 1) is inconsistent with Exhibit A to the petition, which is a detached description of the device (R. 5–8). The description makes no mention of a proposed use of the device in connection with aircraft fires but on the contrary claims invention "of an improved face protector" which will "enable the operator to approach a blaze relatively closely without burning or injuring the face" (R. 8). The demurrer, accordingly, did not admit these allegations of the petition.

right to sue the United States whenever a design of general utility happens to be used in connection with aircraft. The words in question, which limit the right to sue for the use of designs "relating to aircraft and any components thereof", do not have this connotation. Moreover, if any ambiguity lurks in the provision it is readily resolved in favor of the construction adopted below by a comparison of the language with that used in other subsections of Section 10 and by the historical background of the provision.

Section 10 was enacted "to encourage the development of aviation" and contains various provisions intended to stimulate the development of designs relating to aviation. Several paragraphs provide for the holding of competitions in aviation designs and for various emoluments to the winners of the competition in return for the Government's right to use these designs. Section 10 (a), (b), (d), (e), (f), and (g). All of these subsections, which deal with competitions for designs of particular items of equipment designated by the Secretary of the Army or the Secretary of the Navy, specifically refer to "designs of aircraft or aircraft parts or aeronautical accessories." Similarly, subsections relating to other aspects of the acquisition of aeronautical materiel or designs also contain explicit mention of "aircraft, or aircraft parts, or aeronautical accessories." Section 10 (j), (k), (l), (n), (o), (q), (r), and (t). All

of these subsections relate to situations which involve complete administrative control over the determination of the designs of aeronautical accessories for which Government funds are to be expended. This consistent reference to "aeronautical accessories" in provisions subject to final administrative determination strongly suggests that the omission of the phrase in Section 10 (i), where no administrative action is provided, and the definition of the right to sue in terms of designs "relating to aircraft or any components thereof" were deliberate.

Moreover, the historical background clearly demonstrates that the purpose of Section 10 has no relation to a design for the type of device involved in the instant case. Because the Government's procurement practices prior to the enactment of the 1926 statute discouraged the development of new aircraft designs, and for other reasons, the President appointed a board on September 12, 1925, to study "the best means of developing and applying aircraft in national defense." Senate Document No. 18, 69th Cong., 1st sess., pp. 1–2. The hearings before this board disclosed that, although the development of aircraft designs involved the expenditures of large sums of money, they were ordinarily not patentable under existing statutes (Hearings before the President's Aircraft Board, September 21 to October 15, 1925, pp. 1423, 1424, 1425, 1434, 1435, 1729), and that as a result of competitive

bidding requirements for the manufacture of aircraft embodying new designs the manufacturers who developed the new designs would not obtain contracts since the cost of their design, which was available without cost to other bidders, would be included in their bid (*id.*, pp. 1428, 1434, 1435, 1461, 1462, 1470, 1729). The effect of this combination of circumstances was to discourage the development of new designs and to emphasize the need for the establishment of a proprietary interest in aircraft designs to provide an incentive to aircraft manufacturers to maintain engineering organizations that would continue to develop new designs (*id.*, pp. 1434, 1435, 1437, 1438, 1439, 1458, 1461, 1462).

The report of the President's board, which was submitted to Congress on December 10, 1925, recommended full recognition of proprietary rights in design as well as other advantages for aircraft manufacturers which maintained design staffs (Senate Document No. 18, 69th Cong., 1st sess., p. 29). Both the testimony of witnesses before the board and the recommendations of the board, referred to above, indicate an almost complete preoccupation with designs relating to improved aircraft. Section 10 (i), which was contained in the statute enacted several months after submission of the board's report, thus appears to have been devised as a partial solution to the problem of providing proprietary protection to aircraft

designs whether patented or not.[2] There is nothing to indicate that any problem at all was thought to exist in connection with designs of aircraft accessories or patented devices of general use which were also usable in connection with aviation. The purpose of the statutory provision would therefore be completely served by limiting the right to sue for the use of designs of aircraft and aircraft components.

Both the structure of the statute and the reasons for the enactment of Section 10 (i) support the conclusion of the court below that the right

[2] The relation of Section 10 to the recommendations of the President's Aircraft Board is reflected in its Congressional history. On May 27, 1926, H. R. 12471 and H. R. 12472, 69th Cong., 1st sess., were introduced in the House. 67 Cong. Rec. 10247. They related to Army and Navy aeronautics respectively and were almost identical in terms with the present Section 10. The latter bill was introduced by Representative Carl Vinson, who was a member of the President's Aircraft Board. The reports on these bills demonstrate their purpose to meet the problems in aircraft procurement described by witnesses before the Aircraft Board and in the Board's report. H. Repts. Nos. 1395 and 1396, 69th Cong., 1st sess. See also 67 Cong. Rec. 11111–11114. The House and Senate reports on H. R. 10827, 69th Cong., 1st sess., which was eventually enacted as the Air Corps Act of July 2, 1926, 44 Stat. 780, indicate Congressional consideration of the Aircraft Board's hearings and recommendations. H. Rept. No. 700 and Sen. Rept. No. 830, 69th Cong., 1st sess. The conference report on H. R. 10827 shows the incorporation as Section 10 of the provisions of H. R. 12471 and H. R. 12472. H. Rept. 1527, 69th Cong., 1ct sess., pp. 4, 14. In fact, the Hearings Before The President's Aircraft Board show that they were published by the House Committee on Foreign and Interstate Commerce.

granted to creators of designs "relating to aircraft or any components thereof" does not extend to designs relating to aircraft accessories. Furthermore, no reasons appear for granting petitioners any rights against the United States different from those accorded patent holders generally by the Act of June 25, 1910, 36 Stat. 851, 48 Stat. 705, as amended (35 U. S. C. 68). The decision below seems clearly correct and therefore does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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